Supreme Court, U.S.
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No. 08-422

IN THE

Supreme Court of the United States

JASON M. RYAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR REHEARING

DARRIN W.S. MACKINNON*
Lieutenant, JAGC
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**Counsel of Record*

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CERTIFICATION OF COUNSEL

I, DARRIN W.S. MACKINNON, Lieutenant in the U.S. Navy Judge Advocate General's (JAG) Corps, counsel for petitioner, Corporal Jason M. Ryan, USMC, certify that the following Petition for Rehearing is presented in good faith and not for delay.

DARRIN W.S. MACKINNON,
Lieutenant, JAGC
U.S. Navy Reserve
**Counsel of Record*

14232 Catbird Drive
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Counsel for Petitioner

QUESTION PRESENTED

Whether a military defense counsel's refusal to honor a military servicemember's request to appeal his case to the Supreme Court effectively denies him that right under the UCMJ, and, whether that refusal to appeal constitutes ineffective assistance of counsel?

PETITION FOR REHEARING ON DENIAL OF A WRIT OF CERTIORARI

Corporal Jason M. Ryan, a member of the United States Marine Corps, respectfully petitions for a rehearing on this Court's order of November 3, 2008, denying his writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

GROUNDS FOR REHEARING

This Court should grant a rehearing of Corporal Ryan's case because two intervening circumstances of a substantial effect have occurred since this Court's order denying his petition for a writ of certiorari.

The first intervening circumstance is that after this Court denied Corporal Ryan's petition for a writ of certiorari, the Department of the Navy launched a criminal and ethical probe against Corporal Ryan's reserve appellate defense attorney (the undersigned attorney). Appendix A.

Corporal Ryan's petition alleged ineffective assistance of appellate counsel when his active duty military counsel completely neglected to communicate with him and failed to advise Corporal Ryan that he had a statutory right to appeal his court-martial conviction to this Court.

More generally, Corporal Ryan's petition alleged pervasive negligent practices in the military's appellate defense system. Corporal Ryan documented in his certiorari petition how the appellate defense divi-

sions of the armed services systematically refuse to file certiorari petitions to this Court, year after year, constantly abandoning their servicemember clients and disregarding the mandate of Article 70(c), UCMJ, which provides: "Appellate defense counsel shall represent the accused before...the Supreme Court--(1) when requested by the accused;..."

Corporal Ryan's writ argued that he was denied an opportunity to put forward a complete defense, particularly contesting his bad-conduct discharge, when his active duty appellate defense attorney failed to communicate with him in any way. Corporal Ryan based his argument on *Strickland v. Washington*, 466 U.S. 688 (1984) and *Anders v. California*, 386 U.S. 738 (1967). When an appellate attorney completely fails to communicate with his client or advise his client that he has a right to appeal, the attorney flouts this Court's holding in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). In *Roe v. Flores-Ortega*, this Court stated: "We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Id.*, 477. A client cannot instruct his attorney to appeal if he does not even know he has the option to appeal.

The Department of the Navy launched a criminal and ethical probe against Corporal Ryan's reserve appellate defense attorney on November 17, 2008, fourteen days *after* this Court denied Corporal Ryan's petition for a writ of certiorari. The criminal and ethical probe specifically cited Corporal Ryan's petition as a genesis of that probe.

The posture of Corporal Ryan's petition has thus changed dramatically since this Court denied his petition for a writ of certiorari on November 3, 2008.

Corporal Ryan's original petition alleged errors of omission by pointing to what his active duty appellate defense counsel failed to do. Now, the Department of the Navy has raised the stakes and hoisted Corporal Ryan's case like a banner to endorse his active duty appellate counsel's ineffectiveness. The Department of the Navy has retaliated against the reserve attorney who alleged pervasive negligent practices in the military's appellate defense system, essentially ratifying these negligent practices and putting them forth as a policy preference.

Corporal Ryan understands that the Supreme Court of the United States is not primarily an "error-correcting court." But this Court should now take another look at Corporal Ryan's petition because of the unique posture in which his case currently stands: Corporal Ryan's reserve appellate defense attorney alleged ineffectiveness by his active duty appellate defense attorney. And the Department of the Navy now disputes *who* Corporal Ryan's real appellate defense attorney actually was.

A conflict among military counsel such as this will not likely rise again. But Corporal Ryan's fundamental criticism that military appellate defense counsel routinely fail to provide adequate representation to servicemembers will remain a problem, "capable of repetition, yet evading review." *See Honig v. Doe*, 484 U.S. 305 (1988); *Roe v. Wade*, 410 U.S. 113, 125 (1973).

Corporal Ryan's petition presents an important case about the statutory and ethical scope of defense representation in the military and the proper role of the military defense attorney. Corporal Ryan's reserve appellate defense attorney's response to the Department of the Navy, Appendix B, explains why

an appellate defense advocate must demonstrate unfettered loyalty to his client – a universally accepted principle that the Department of the Navy now seems willing to repudiate by attacking Corporal Ryan's reserve military defense attorney.

The second intervening circumstance after Corporal Ryan's petition was denied is this Court's grant of certiorari in *United States v. Denedo*, Case Number 08-267, on November 25, 2008. The *Denedo* grant of certiorari vindicates Corporal Ryan's position that this Court almost always exercises certiorari jurisdiction over cases involving servicemembers against the servicemember's interests and in favor of the government. In fact, this Court seldom shows interest in servicemember cases at all (only eight times since Congress established that authority 25 years ago under the Military Justice Act of 1983). Based on the government's arguments in *Denedo,* it is yet another case granted to protect the government's interests, not those of servicemembers.

In light of this Court's new *Denedo* grant, rehearing Corporal Ryan's case will establish a reasonable balance between the government's interests and those of servicemembers. Granting certiorari in Corporal Ryan's case will also reverse the sense that this Court is largely indifferent to the right of servicemembers to be represented before this Court. This Court's apparent indifference to the rights of soldiers, sailors, airmen and Marines contrasts dramatically with its historic preference for the interests of the government, as reflected in the *Denedo* grant. Finally, granting Cpl Ryan's petition will reverse the sense that this Court displays less interest in servicemembers than enemy combatants.

Servicemembers lose many rights when they

volunteer to serve our nation. *Parker v. Levy*, 417 U.S. 733 (1974). They also subject themselves to a host of much stricter criminal sanctions under the UCMJ. Accordingly, servicemembers should be advised of their right to have their cases reviewed by this Court under 28 U.S.C. § 1259(3) and 10 U.S.C. § 870(c), Art. 70(c), UCMJ. A military defense counsel who completely fails to communicate with his client and fails to advise his client of the right to appeal to this Court violates the UCMJ and is ineffective.

CONCLUSION

Corporal Ryan respectfully requests the Court grant this petition for a rehearing.

This Court may remand Corporal Ryan's case to the Court of Appeals for the Armed Forces (CAAF), which is authorized under military law to order findings of fact and conclusions of law regarding Corporal Ryan's appellate representation and the military's appellate defense practices. *See United States v. DuBay*, 37 C.M.R. 411, 413 (C.M.A. 1967).

Respectfully submitted,

Darrin W.S. MacKinnon*
Lieutenant, JAGC
U.S. Navy Reserve
**Counsel of Record*

14232 Catbird Drive
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November 2008

APPENDIX A

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON NAVY YARD
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON DC 20374-5066

IN REPLY REFER TO
1610
Ser 13/4PR13421.08
17 NOV 2008

From: Assistant Judge Advocate General (Civil Law)(Acting), Office of the Judge Advocate General

To: Commanding Officer, Defense Institute of International Legal Studies Reserve Unit

Subj: PROFESSIONAL RESPONSIBILITY AND ETHICS ISSUES INVOLVING CONTINUED REPRESENTATION OF ACTIVE DUTY CLIENTS AFTER DETAILED COUNSEL'S TERMINATION OF ACTIVE DUTY

Encl: (1) Writ of Certiorari ICO Ryan

1. I am writing to you in my capacity as Rules Counsel for the Judge Advocate General Corps as well as an ethics counselor for the Office of the Judge Advocate General. Facts have been brought to my attention regarding Lieutenant Darrin MacKinnon, JAGC, USNR, and his representation of a former

military client that raise concerns. As set forth in more detail below, LT MacKinnon filed Writs of Certiorari (Writs) before the U.S. Supreme Court on behalf of several former military clients. His actions potentially violate JAGINST 5803.1C as well as 18 U.S.C. § 205.

2. The facts as relayed to me are as follows. LT Darrin MacKinnon, prior to leaving active duty (AD), worked at Code 45 (appellate defense). LT MacKinnon left AD in September 2007 and now works for the Department of State (DOS). He remained with the Navy Reserve and is currently assigned to the Defense Institute of International Legal Studies (DIILS). His assigned duties do not include practicing military justice.

3. While on AD at Code 45, LT MacKinnon represented Corporal Ryan, USMC, during the appellate process. In *United States v. Ryan*, Appellant was detailed new military appellate counsel when LT MacKinnon left AD. Upon review, the Court of Appeals for the Armed Forces (CAAF) affirmed the case. The newly-appointed appellate counsel advised Appellant there was no merit in filing a Writ with the U.S. Supreme Court and refused to file. Appellant then contacted LT MacKinnon who filed a Writ on his behalf. In the Writ, LT MacKinnon wrote, "[t]he undersigned attorney, still a member of the United States Navy Reserve...pleading for assistance. The undersigned attorney, now serving as a Foreign Service Officer in Peshawar, Pakistan, agreed to assist and hastily assembled this Petition in one day." Enclosure (1). The Writ was signed "Darrin W.S. MacKinnon*,

Lieutenant, JAGC, U.S. Navy Reserve, *Counsel of Record, 14232 Catbird Drive, Gainesville, VA 20155, (703) 930-5161." *Id.* At 13. It is also my understanding that LT MacKinnon has since filed at least two additional Writs before U.S. Supreme Court on behalf of two other Service Members.[1]

4. Once established, the attorney-client relationship may be severed only by the accused's express release of the attorney, by a court order, or for other "good cause." A military defense counsel's release from AD normally constitutes good cause for severing the attorney-client relationship.[2] Nevertheless, an accused and former military counsel may affirmatively enter into a voluntary agreement extending the attorney-client relationship beyond the counsel's departure from active duty, so long as the defense counsel *then acts as civilian counsel* at no expense to the government. *See generally United States v. Andrews*, 21 U.S.C.M.A. 165, 44 C.M.R. 219 (C.M.A. 1972); *see also* AR 27-10, Appendix C. Additionally, if the attorney obtains a Reserve commission, he may be ordered to represent the

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[1] I have not received copies of the additional two Writs.

[2] *See, e.g., United States v. Spriggs*, 52 M.J. 235, 246 (C.A.A.F. 2000)(discussing that while the facts of the case at hand failed to even form a qualifying attorney-client relationship, in general, absent government misconduct, routine separation from active duty constitutes good cause for severance); *United States v. Dahood*, 32 M.J. 852 (N.M.C.M.R. 1991); *United States v. Richter*, 37 M.J. 615 (A.C.M.R. 1993); *United States v. Lolagne*, 11 M.J. 556 (A.C.M.R. 1981); *United States v. Greenwald*, 37 M.J. 537 (A.C.M.R. 1993); *United States v. Harris*, 8 M.J. 668 (A.C.M.R. 1979); *United States v. Jones*, 4 M.J. 545 (A.C.M.R. 1977); Manual of the Judge Advocate General, Section 0131(d)(2007)

client to the extent permitted by law and based on a determination by the appropriate official of reasonable availability. *See United States v. Spriggs*, 52 M.J. at 245-46 (citing *Cf.* para. 1b(2), App. C., AR 27-10). In the case at hand, to the best of my knowledge, LT MacKinnon has not been ordered by your unit to continue the representation (nor was an IMC request received).[3] LT MacKinnon cannot make the unilateral decision to detail himself to these cases in his Reserve capacity; and his filing with the U.S. Supreme Court, at least by implication, indicates he is representing Corporal Ryan in his Reserve capacity.

5. The actions of LT MacKinnon concern me from a professional responsibility perspective. JAGINST 5803.1C, Rule 1.5, Fees, restricts a Reserve Judge Advocate who has initially represented a client

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[3] Note: AR 27-10 has changed since the decision in *United States v. Spriggs*, however, the discussion in *Spriggs* has not been repudiated. AR 27-10 now states: (2) *Dissolution.* An attorney should not normally be assigned as a counsel to a case unless he or she can be expected to remain for trial. If it appears that he or she will not be available for trial, the client must be notified at the inception of the relationship. Military requirements or orders to move the attorney (as proper personnel management requires) will be respected. An attorney will not, without his or her own agreement, be retained on duty beyond a service appointment merely to maintain an existing relationship with respect to a particular case or client. Since no authority exists to hire a civilian attorney at Government expense to represent a Soldier in a court-martial, no former officer should expect to be retained by the Government to represent a Soldier with whom that officer had developed an attorney-client relationship. It is regarded as unethical for an attorney to arrange that only he or she could continue in any particular case.

concerning a matter as part of the attorney's official Navy duties, from accepting any salary or other payments as compensation for services rendered to that client in a private capacity, *unless so authorized by the JAG.* Rule 1.5 also places limitations on a U.S. Government (USG) attorney from using an official position to solicit or obtain clients for a private practice. While I am not aware of LT MacKinnon accepting fees or improperly soliciting clients, as Rules Counsel I would like to ensure he is aware of these restrictions.

6. Rule 1.7, Conflicts of Interest, states that the conflict of interest rules apply to Reservists only while they are actually drilling or on active duty. Therefore, unless otherwise prohibited by criminal conflict of interest statutes, Reserve attorneys providing legal services in their civilian capacity may represent clients, or work in firms whose attorneys represent clients, with interests adverse to the United States. But if a Reserve attorney represents, in their civilian capacity, persons whose interests are adverse to the DON, they will provide written notification to their supervisory attorney and commanding officer, detailing their involvement in the matter. *See* Rule 1.7, Comment (10). Again, as Rules Counsel, I want to ensure LT MacKinnon is aware of his responsibilities.

7. Finally, I am concerned with potential misrepresentations to the court and the parties as to LT MacKinnon's capacity. His statements in the Writ, which identify that he is off AD and now in the Reserves, implies that he is representing Appellant in his Naval Reserve capacity. Failure to correct this

implication could potentially violate Rule 3.3, "Candor and Obligations towards the Tribunal," or Rule 4.1, "Truthfulness in Statements to Others," because he is arguably "misrepresenting" himself. Additionally, LT MacKinnon should be informed that his representation is not covered by the Navy for purposes of malpractice issues and/or insurance.

8. It is permissible for a Reserve Judge Advocate, in his civilian capacity, to represent a former client under Navy JAG professional responsibility rules, provided the representation is pro bono and the judge advocate informs his supervisory attorney and Reserve Commanding Officer in writing. Thus, while the facts provided do not clearly demonstrate a professional responsibility violation, I am concerned that one might exist, and that LT MacKinnon needs to be aware of his restrictions and obligations. I leave it to your determination as to whether the procedures outlined in Enclosure (2), JAGINST 5803.1C need to be pursued after additional facts are obtained.

9. LT MacKinnon, however, must also comply with federal criminal conflict of interest statutes. Since LT MacKinnon is an employee of the DOS, the most relevant statute is 18 U.S.C. § 205.[4] In pertinent part, it states: "Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, other than in the

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4 *See also* 18 U.S.C. § 203 (similar criminal statute but generally applies when the counsel accepts fees for the representation).

proper discharge of his official duties...(2) acts as an agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest; [shall be subject to the penalties identified in 18 USCS § 216]....(d)(1) Nothing in subsection (a) or (b) prevents an officer or employee, *'if not inconsistent with the faithful performance of that officer's or employee's duties*, from acting without compensation as agent or attorney for, or otherwise representing— (A) *any person who is the subject of disciplinary*, loyalty, or other personnel administration proceedings in connection with those proceedings; or..." (Emphasis added).

10. Under this statute an attorney who works for the federal government may not act as an agent against the federal government. The statute identifies exceptions. None of those exceptions, however, appear to apply to the facts of this case.[5] Should any exception apply, LT MacKinnon must receive permission from DOS (his federal employer) to continue his representation. *See, e.g.*, 5 C.F.R. 3801.106. Regardless of whether an exception does apply, LT MacKinnon should inform DOS of his actions. Of note, violations of 18 U.S.C. § 205 carry potential criminal sanctions.

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[5] Despite the absence of case law defining "disciplinary," the general consensus is that the term refers to administrative proceedings vice courts-martial based on the context of the section's remaining language.

11. The actions of LT MacKinnon concern me in my capacity as Rules Counsel and as an ethics counselor. While I have not initiated formal processing in this case, I bring these facts to your attention, so that you may take any action you deem necessary to resolve the matter. If LT MacKinnon believes he is representing these clients in his Reserve capacity he needs to be advised appropriately. If his representations are in his civilian capacity, such representations must be pro bono, and not contrary to 18 U.S.C. § 205.

12. Regardless of your method of inquiry, please contact me within 30 days from receipt of this letter to report the facts and your actions/recommendations in this matter. If you have any questions or concerns, please do not hesitate to contact me or my action officer in this matter, LCDR Kathleen Elkins, 703-614-7403, Kathleen.elkins@navy.mil.

//s//
C.N. MORIN

Copy to:
RADM Norton Joerg, JAGC
RDML (Sel) Steven Talson, JAGC, USNR
Code 02, OJAG

APPENDIX B

Darrin W.S. MacKinnon
14232 Catbird Drive
Gainesville, Virginia 20155

1610
28 Nov 2008

From: Lieutenant Darrin W.S. MacKinnon, JAGC, USNR

To: Assistant Judge Advocate General (Civil Law), Office of the Judge Advocate General

Via: Captain Stephen R. Sarnoski, JAGC, USNR

Subj: PROFESSIONAL RESPONSIBILITY AND ETHICS ISSUES INVOLVING CONTINUED REPRESENTATION OF ACTIVE DUTY CLIENTS AFTER DETAILED COUNSEL'S TERMINATION OF ACTIVE DUTY

Ref: (a) Code 13 letter 1610 dtd 17 Nov 2008
(b) *United States v. Ryan*, ___ U.S. ___ (2008) (denying cert.)
(c) JAGINST 5803.1C
(d) 18 U.S.C. § 205
(e) Art. 70, UCMJ, 10 U.S.C. § 870
(f) Art. 92, UCMJ, 10 U.S.C. § 892
(g) R.C.M. 1202(b)(2)
(h) ABA Model Rules, *Client-Lawyer Relationship*, Rule 1.3 Diligence
(i) Virginia Disciplinary Rule 2-108(C)

(j) Virginia Disciplinary Rule 7-101(A)
(k) Virginia Legal Ethics Op. 1558, *Withdrawal of Representation,* Oct 20, 1993
(l) Virginia Legal Ethics Op. 1005, *Duty to File Post-Conviction Motions*, Nov 24, 1987
(m) ABA Rules of Professional Responsibility, Ethical Consideration 5-1

Encl: (**Enclosures are not included in this Petition*).

1. I have represented my military clients with loyalty, honesty, zeal, in good faith, without compensation, and in keeping with the highest traditions of the Navy Judge Advocate General's (JAG) Corps. This letter is respectfully submitted in response to reference (a). My clients and my JAGC colleagues can attest to my dedication.

2. I am a JAGC Lieutenant in the drilling Navy Reserve, currently assigned to the Defense Institute of International Legal Studies (DIILS), NR DIILS 501, in Newport, Rhode Island. My full-time employment is as a Foreign Service Officer for the United States Department of State. I currently serve as the Political-Economic Officer, United States Consulate, Peshawar, Pakistan. I am a member of the State Bar of Virginia and the American Bar Association.

3. I was detailed by the Judge Advocate General of the Navy, via the Director of the Navy-Marine Corps Appellate Defense Division (OJAG, Code 45), to represent my military clients as part of my official military duties while serving at Code 45 from November 2005 through September 2007, when I left

active duty. I immediately affiliated with the Navy Reserve when I was discharged from active duty in September 2007.

4. I have both a professional ethical duty as a lawyer and a military duty as a naval officer to zealously represent my clients and to provide them with the best defense possible, without fear of retaliation, including the full range of appellate representation, up to and including the Supreme Court of the United States.

a. I have a duty as a lawyer licensed in the Commonwealth of Virginia to zealously represent my clients. According to the Virginia state bar, Disciplinary Rule 7-101(A)[DR:7-101] a lawyer must seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules. This rule imposes an ethical duty on me to file motions on behalf of my clients. *See* Legal Ethics Opinion [LEO] 1005, *Duty to File Post-Conviction Motions*, November 24, 1987. Moreover, DR 2-108(C), states that counsel of record *shall not withdraw* except by leave of court after notice to the client of the time and motion for leave to withdraw. In addition, LEO 1558, *Withdrawal of Representation*, requires me to take *all steps necessary* to avoid prejudice to the client's rights before withdrawing. (If I know that an active-duty detailed counsel is not communicating with my client and/or will not file pleadings or arguments in court advancing our common client's interest, then I am required to take all steps necessary to avoid prejudice to my client's rights, which includes filing a pleading in court advancing the client's interest.)

ABA Ethical Consideration 5-1 [EC: 5-1] provides that as an attorney, I should exercise my professional judgment within the bounds of the law, solely for the benefit of my client, free from compromising influences and loyalties. Under EC: 5-1, neither the attorney's personal interest, nor the interest of other clients, nor the desires of third persons should be permitted to encumber this loyalty. As a lawyer, I therefore owe unfettered loyalty to my military clients. Except for obvious limitations, this duty must supersede the needs of society, the military, the Navy, the JAG Corps, my supervisors, my colleagues — and even surpass my own prospects for promotion.

b. I have a duty as a military lawyer to zealously represent my clients. Under the Uniform Code of Military Justice (UCMJ), Congress has mandated, "Appellate defense counsel shall represent the accused . . . ." Art. 70, UCMJ, 10 U.S.C. § 870. The President of the United States has also required an appellate defense counsel to "represent the accused." R.C.M. 1202(b)(2). And the Judge Advocate General of the Navy has required in a regulation that binds all Marine and Navy judge advocates: "Nothwithstanding a judge advocate's status as a commissioned officer subject, generally, to the authority of superiors, a judge advocate detailed or assigned to represent an individual member or employee of the Department of the Navy is expected to exercise unfettered loyalty and professional independence during the representation consistent with these Rules and remains ultimately responsible for acting in the best interest of the individual client." JAGINST 5803.1C, Professional Conduct of Attorneys Practicing Under the Cognizance and Super-

vision of the Judge Advocate General, Rule 5.4(a) (9 Nov 04). If I did not defend my military clients, then I could be committing a criminal offense under the UCMJ. Art. 92, UCMJ, 10 U.S.C. § 892.

5. My assigned duties did not end upon my departure from active duty. The attorney-client relationship with my military clients was never severed. I did not withdraw from my military cases. While other active duty appellate defense attorneys were added, that is, detailed to my military clients, after I left active duty, I was never "un-detailed." Nor was I ever notified of any such action. Customarily, an attorney must take the affirmative step of withdrawing from a case to sever the attorney-client relationship and terminate the attorney's duties to his or her client. I have not done so.

6. My practices and filings on behalf of my clients have been entirely transparent since I left active duty. I have filed scores of briefs and other submissions with the Navy-Marine Court of Criminal Appeals (NMCCA), the Court of Appeals for the Armed Forces (CAAF), and the Supreme Court of the United States on behalf of my military clients since I left active duty. I have placed my contact information (address, telephone number, e-mail) on all of these pleadings, clearly (and accurately) identified myself as a member of the Navy Reserve, and I have had numerous communications with both my active duty appellate counsel colleagues and government counsel on the other side. Two cases before the Court of Appeals illustrate this point. When one of my cases was decided on the merits, the CAAF, in keeping with its practice, listed me among the attorneys,

having been "on brief," referring to me as a JAGC Lieutenant in the Navy Reserve. *United States v. Moorefield,* 66 M.J. 170 (C.A.A.F. 2008) (per curiam). In another case, after I submitted a petition for review of a court-martial conviction for a Marine using my Navy Reserve title, the government moved to have me submit an affidavit to the court clarifying my status as either civilian or military. After I fully advised the Court of the facts and circumstances of my representation as a reserve attorney, the Court denied the government's motion. *United States v. Carromero,* 66 M.J. ____ (C.A.A.F. 2008) (mem.)(No. 08-144; May 7, 2008).

7. The Director of Code 45 contacted me in November 2007 (while I was attending Pashto language training at the Foreign Service Institute) to notify me that he had detailed other (active duty) counsel to my cases and urged me to "move on." But neither he nor his Deputy ordered me to withdraw, and neither has contacted me since then to discuss any reservations they may have with my continuing to represent my military clients as a reserve officer not on active duty. Code 45 has thus obtained the benefit of over 100 hours of my time over the course of a full year, during which I openly and continually filed pleadings, briefs and Court of Appeals "supplements" for military clients. I was never ordered to stand down and cease representing those clients.

8. My military clients specifically requested that I continue to represent them as their military attorney. I honored their requests. As a Navy reservist I filed these cases in an analogous manner to

how many other ex-Code 45 attorneys have continued to represent their clients after their departure from the Appellate Defense Division, even when their new assigned duties no longer included appellate representation. (Some ex-Code 45 attorneys have gone on to serve as Staff Judge Advocates, on military commissions, on "IA's," or at other OJAG Codes, where their "assigned duties" do not include appellate representation, either). I also consulted the State Bar of Virginia in December 2007, and was informally advised that there was no state ethical impediment to my continuing to represent individuals for whom I was appellate defense counsel after my release from active duty.

9. As directed by my Commanding Officer, Captain Sarnoski, I will now respond to each of the numbered paragraphs of reference (a).

a. In response to ¶ 1, I have filed three petitions for writs of certiorari for clients for whom I was detailed as appellate defense counsel: Corporal Jason M. Ryan, USMC, 1st Lt Raymon F. Thomas, USMC, and Sergeant Daqric B. Moorefield, USMC. All of these petitions were denied. I do not agree that filing these petitions violated either references (c) or (d).

b. The facts stated in ¶ 2 are correct to the extent that the last sentence is read to refer only to duties assigned in respect of my assignment to DIILS. It has been my understanding that my duties as appellate defense counsel survived my separation from active duty.

c. The fourth sentence in ¶ 3 is incorrect in part. Lieutenant William "Scott" Stoebner, JAGC, USN, declined to file a petition for a writ of certiorari for Cpl Ryan. Cpl Ryan emailed LT Stoebner asking to discuss the case, but I do not have LT Stoebner's response, if any. I have been informed by Cpl Ryan that he received no response. More importantly, Cpl Ryan informed me that he received *no communication* from anyone. Cpl Ryan was not even informed that he had a statutory right to appeal to the Supreme Court of the United States. Therefore, the statement that Cpl Ryan's "newly-appointed appellate defense counsel advised Appellant there was no merit in filing a Writ on his behalf" blatantly misrepresents the facts. Cpl Ryan was not "advised" of anything. No active-duty attorney ever contacted him. This is a serious problem and a central point I argued in the *Ryan* cert petition. [*Cf*, American Bar Association Model Rules of Professional Conduct *Client-Lawyer Relationship*, Rule 1.3 Diligence]. The last sentence of this paragraph is incorrect to the extent that it suggests that the *Ryan* certiorari petition was the first of the three to be filed. In fact, it was the third.

d. In response to ¶ 4, I did not detail myself to represent any client. I was detailed to represent each member I have assisted in military appeals. No one ever revoked my detail to any appellate case. None of the members I have continued to represent following my separation from active duty have requested that I no longer represent them, and indeed, each one from whom I have heard affirmatively requested that I continue to do so, after full disclosure of their options. I respectfully disagree

with this paragraph's narrow reading of *United States v. Andrews*, 21 U.S.C.M.A. 165, 44 C.M.R. 219 (1972). That case does not address the situation in which military appellate defense counsel leaves active duty but retains a reserve commission. *United States v. Spriggs*, 52 M.J. 235 (C.A.A.F. 2000), is wide of the mark because, as Judge (as then was) Effron noted (at 246), the counsel in question, "after his separation from active duty, did not agree to represent appellant either as a reserve judge advocate or as a civilian attorney." In contrast, I have been entirely willing to continue to represent those members for whom I was detailed as appellate defense counsel. While routine separation from active duty normally terminates the attorney-client relationship, doing so requires some affirmative step, and neither my clients, nor I, nor the Navy Department, ever took such a step. AR 27-10 does not apply to Navy judge advocates except when such judge advocates serve in connection with Army courts-martial. The fact that departure from active duty is good cause to sever an existing attorney-client relationship, *United States v. Lolange*, 11 M.J. 556, 557 (A.C.M.R. 1981), implies a need for affirmative action to sever, rather than severance by operation of law. The three post-separation certiorari petitions I have filed as appellate defense counsel for Marine clients indicate my reserve status because that is the capacity in which I rendered services.

e. I am aware of the restrictions noted in ¶ 5. The post-separation services I rendered to personnel for whom I was detailed as appellate defense counsel were rendered without fee. Prior to leaving active

duty I was properly detailed to represent each of the individuals for whom I have provided appellate defense services following my separation.

f. In response to ¶ 6, I am aware of my responsibilities under Rule 1.7. A list of the appellate defense cases on which I recall having worked following my separation in September 2007 is enclosed. See Enclosure (7). Copies of pleadings, briefs and "supplements," are available from the Appellate Defense Division, the Appellate Government Division, CMTIS database, and the files of the NMCCA and the CAAF. Both my active-duty colleagues and clerical staff at Code 45 have informed me that the CMTIS database continues to show me as counsel in the cases to which I was detailed while on active duty.

g. Contrary to ¶ 7, I have never knowingly misrepresented a fact or other matter, including my personal capacity, before any court of law. My pleading in the *Carromero* case before the CAAF, where I openly explain that I am acting in my capacity as a reserve attorney, speaks directly to this point. It has indeed been my understanding that my post-discharge representation of Naval Service personnel in matters to which I was properly detailed during my active duty, and from which I have never been relieved by the Navy or my clients, has been in my capacity as a Navy Reserve officer. I have not investigated the insurance or malpractice implications of doing so and I am therefore not in a position to agree or disagree with the last sentence of ¶ 7. But now, I at least understand Code 13's position.

h. Contrary to ¶ 8, a former active duty judge advocate may not only continue to represent a military client, but may charge a fee. Reference (a) cites no contrary authority. Please refer to Opinion 313 of The District of Columbia Bar Ethics Committee. *cf. United States v. Nguyen*, 56 M.J. 252 (C.A.A.F. 2001) (mem.). I have not violated reference (c), and there is no basis for invoking the complaint processing procedures set forth in Enclosure (2) thereof.

i. I am aware of the provisions cited in ¶ 9. They do not apply to the legal services I furnished to military clients for whom I have been detailed as appellate defense counsel. I have provided those services in my capacity as a Navy Reserve officer and not as a Foreign Service Officer. I consulted with a departmental ethics advisor concerning my representation of such clients and was told that I could continue to represent my military clients in my reserve capacity.

j. As suggested in ¶ 10, I will inform the appropriate office of the Department of State of my post-separation activities as appellate defense counsel for clients for whom I was detailed prior to my separation.

k. Most of ¶ 11 is addressed to the via addressee. In response to the last sentence, my post-separation appellate defense activities have been pro bono.

1. Paragraph 12 is addressed to the via addressee.

10. The practical implications of the position set forth in reference (a) should be very carefully considered. First, such a narrow authorization to practice appellate defense is antithetical to allowing Appellate Defense Division attorneys to complete their cases when moving to other assignments within the Navy or Marine Corps. Thus, the suggested position is overbroad and applies principles to my conduct that would prove too much. When appellate cases are "handed-off" to other attorneys, the new attorney seldom reads the record of trial and does not always call the client. The letter from CAPT Hans Graff, JAGC, USNR, a member of my reserve unit, and a prior member of Code 45's supporting reserve unit, explains why a military-rooted attorney-client relationship should and does survive a Judge Advocate's mere change in unit. Second, such a narrow authorization to practice appellate defense discourages the use of volunteers, thereby running counter to settled principles of naval leadership. Third, at a time when the Appellate Review Activity is only beginning to emerge from a long and embarrassing period during which delay was rampant and regularly violated clients' due process rights, *e.g.*, *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), it makes little sense to turn away a perfectly acceptable means of augmenting the regular complement of the Appellate Defense Division with experienced officers. The Navy active-duty and reserve component are an integrated "total force." Fourth, the position expressed in reference (a) would add to the ministerial burdens of all

concerned (to include NMCCA and the CAAF) by mandating formal motions to withdraw, and client consent, every time an Appellate Defense Division lawyer leaves that division. Fifth, the impact of the position suggested would undermine client confidence in the dedication, zeal, and above all, the loyalty of detailed Appellate Defense Counsel. No bright-line rules or black letter law applies to a reserve judge advocate's continued representation of his military clients. But Ethical Consideration 9-2 admonishes that "[W]hen explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession." By choosing to continue representing my military clients in the appeal process, including up to the Supreme Court, my conduct would inspire confidence in the public that servicemembers receive unfettered and continued loyalty and the full range of appellate defense. At the end of the day, perhaps the issues raised in ref (a) cry out for better management and clearer guidance, but not ethical allegations.

11. I am currently counsel of record in several fully-briefed cases in the NMCCA and the CAAF. Please advise as to whether in your office's view I have a duty to move for leave to withdraw. While I have put forward my position as forcefully as possible, if you or other competent authority so directs, in writing, I will of course obey, on notice to the affected clients.

12. Copies of reference (a) were sent to two Flag Officers and one other senior officer of our Corps. I would have hoped that I would be afforded an

opportunity to comment on the matters raised in it before, rather than after, the concerns expressed were shared with the highest levels of the JAG Corps. Since these ethical concerns have already been released, may I respectfully request that a copy of this letter be furnished to the carbon copy addressees of reference (a).

Very respectfully,

//s//

Darrin W.S. MacKinnon

cc(w/encls): Eugene R. Fidell, Esq.